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13 **UNITED STATES BANKRUPTCY COURT**

14 **NORTHERN DISTRICT OF CALIFORNIA**

15 **SAN JOSE DIVISION**

16 In re:	)	Cases Jointly Administered
17 <b>COMMUNITY TOWERS I, LLC,</b>	)	Case No. 11-58944-SLJ-11
18     A Delaware Limited Liability Company,	)	
19     Employer Tax I.D. No. 75-2456729,	)	
20 <b>COMMUNITY TOWERS II, LLC,</b>	)	Case No. 11-58945-SLJ-11
21     A Delaware Limited Liability Company,	)	
22     Employer Tax I.D. No. 75-2560662,	)	
23 <b>COMMUNITY TOWERS III, LLC,</b>	)	Case No. 11-58948-SLJ-11
24     A Delaware Limited Liability Company,	)	
25     Employer Tax I.D. No. 32-0065635,	)	
26 <b>COMMUNITY TOWERS IV, LLC,</b>	)	Case No. 11-58949-SLJ-11
27     A Delaware Limited Liability Company,	)	
28     Employer Tax I.D. No. 77-0379075,	)	Chapter 11
29     Debtor(s).	)	Date: July 24, 2013
30     111 W. Saint John Street, Suite 705	)	Time: 2:00 p.m.
31     San Jose, California 95113	)	Place: United States Bankruptcy Court
32		280 S. First Street, Room 3099
33		San Jose, CA 95113
34		Judge: Honorable Stephen L. Johnson

35 **DEBTORS' OPPOSITION TO CIBC'S MOTION TO DISMISS**  
36 **THE DEBTORS' CLAIM OBJECTIONS FOR WANT OF PROSECUTION**

37 Community Towers I, LLC, Community Towers II, LLC, Community Towers III, LLC and  
38 Community Towers IV, LLC (collectively, the "Debtors") hereby submit their opposition to the  
39 MOTION TO DISMISS THE DEBTORS' CLAIM OBJECTIONS FOR WANT OF PROSECUTION (the "Motion")  
40 filed by CIBC, Inc. ("CIBC"). This Response is supported by the DECLARATION OF JOHN L. FEECE

1 IN SUPPORT OF DEBTORS' OPPOSITION TO CIBC's MOTION TO DISMISS THE DEBTORS' CLAIM  
2 OBJECTIONS FOR WANT OF PROSECUTION (the "Feece Declaration") filed concurrently herewith.  
3

4 **I. THE MOTION**

5 1. CIBC's Motion requests that the Court dismiss the Debtors' OBJECTIONS TO PROOFS  
6 OF CLAIM NOS. 4, 5 6 AND 7 (CIBC, Inc.) (the "Claims Objection") for want of prosecution pursuant  
7 to Rule 7041 as incorporated by Rule 9014(c) of the Federal Rules of Bankruptcy Procedure. The  
8 Debtors respectfully submit that CIBC seeks to obtain a windfall advantage by not having to actually  
9 litigate their claim in requesting the Court to simply dismiss the Claims Objection. For the reasons  
set forth below, the Court should deny CIBC's Motion.

10 **II. RELEVANT BACKGROUND**

11 2. Each of the Debtors is a limited liability company formed under the laws of the State  
12 of Delaware on June 1, 2006 for the purpose of acquiring that certain two building, 305,000 square  
13 foot office complex located at 111 West Saint John Street and 111 North Market Street, San Jose,  
14 California commonly known as the Community Towers (the "Subject Property"). In the ordinary  
15 course of their businesses, the Debtors utilized rents from the Subject Property as the source of  
16 working capital for their pre-petition operations. CIBC is the holder of a first deed of trust on the  
17 Subject Property.

18 3. On September 26, 2011, (the "Petition Date"), the Debtors each filed a Voluntary  
19 Petition under Chapter 11 of the Bankruptcy Code.

20 4. On October 5, 2012, the Debtors filed the Claims Objection. Subsequently, the Court  
21 entered its ORDER RE: OBJECTION TO PROOFS OF CLAIM NOS. 4, 5, 6 AND 7 which clarified that  
22 because a hearing on an objection to claim requires 30 days' notice, the Court would consider  
23 CIBC's claim in the context of plan confirmation but would not issue a final ruling on the  
24 allowability of such claim at the hearing on confirmation of the DEBTORS' JOINT PLAN OF  
25 REORGANIZATION (DATED MARCH 27, 2012) (as modified by the FIRST MODIFICATION TO DEBTORS'  
26 JOINT PLAN OF REORGANIZATION (DATED MARCH 27, 2012) filed on August 31, 2012, the "Plan").

27 5. The Court held a two-day evidentiary hearing on confirmation (the "Confirmation  
28

1       Hearing") of the Plan, on October 15 and 16, 2012.

2       6.       The only evidence in the record of the Confirmation Hearing on the value of the  
3       Subject Property was an appraisal made by Donn Byrne of Colliers International, who opined that  
4       the Subject Property had a fair market value of \$41,000,000 as of October 31, 2011. [See Debtors'  
5       Exhibit 12 submitted at the Confirmation Hearing].

6       7.       On December 12, 2012, the Debtors filed the SECOND MOTION FOR ORDER  
7       APPROVING USE OF CASH COLLATERAL (the "Second Cash Collateral Motion") and supporting  
8       DECLARATION OF DONN H. BYRNE, JR. IN SUPPORT OF DEBTORS' SECOND MOTION APPROVING USE  
9       OF CASH COLLATERAL which attaches an updated appraisal that states, *inter alia*, Mr. Byrne's  
10      opinion that the Subject Property was worth \$44,000,000 as of October 1, 2012.

11      8.       Mr. Byrne has completed an updated appraisal which states, *inter alia*, Mr. Byrne's  
12      opinion that the Subject Property was worth \$46,000,000 as of February 28, 2013. A true and  
13      correct copy of such appraisal is attached to the Feece Declaration as its Exhibit "A" and is  
14      incorporated herein by reference.

15      9.       On January 25, 2013, the Court entered its ORDER DENYING CONFIRMATION OF  
16      DEBTORS' JOINT PLAN [Docket No. 251] (the "Confirmation Denial Order"), denying confirmation  
17      of the Plan. Among other things, the Confirmation Denial Order discusses in depth CIBC's claim  
18      and the Debtors' arguments why the claim is overstated. Ultimately, the Court found that CIBC is  
19      not entitled to default interest on its claim in the bankruptcy cases, and it estimated such claim at  
20      \$37,234,279.20.

21      10.      On February 19, 2013, CIBC filed its SECOND MOTION FOR STAY RELIEF requesting  
22      that the Court lift the automatic stay pursuant to 11 U.S.C. §§ 362(d)(1) and 362(d)(3) so that it may  
23      "proceed with its rights and remedies as a secured creditor of the Debtors." After a hearing on  
24      March 5, 2013, the Court entered its ORDER CONDITIONALLY GRANTING CIBC INC.'S SECOND  
25      MOTION FOR STAY RELIEF (the "Conditional Stay Order") increasing the adequate protection  
26      payments to be paid by the Debtors to CIBC and providing, *inter alia*, that the automatic stay  
27      provided under 11 U.S.C. § 362(a) will be lifted if the Debtors fail to pay CIBC all amounts allowed  
28

1 in connection with its secured claims in the bankruptcy cases, by September 1, 2013.  
2

3 11. As the Debtors have indicated to the Court<sup>1</sup>, since the Confirmation Hearing, the  
4 Debtors have continued to operate their businesses and make adequate protection payments to CIBC  
5 required under the Conditional Stay Order (including full interest payments at the contract rate),  
6 while increasing the profitability of the business. The value of the Subject Property has increased  
7 significantly based upon the increase in occupancy by the Debtors' operations as well as continually  
8 improving market conditions. The Debtors also have committed extensive time to searching out  
9 alternate lenders for the Subject Property as well as potential buyers and investors for the Subject  
10 Property. The Debtors have communicated several refinance opportunities directly to CIBC outside  
11 of counsel in an effort to reach a resolution without an according response. Moreover, the Debtors  
12 have been working diligently with existing and new counsel to complete an amended plan of  
13 reorganization that the Debtors believe will satisfy all requirements to be confirmable even if the  
14 Debtors do not sell or refinance the Subject Property. The Debtors, however, will require additional  
15 time beyond the September 1, 2013 deadline set forth in the Conditional Stay Order, to complete the  
16 plan confirmation process. Consequently, they will be filing a motion to request that the Court  
17 extend the automatic stay beyond such deadline.<sup>2</sup>

### 18 III. DISCUSSION

#### 19 A. The Motion Establishes No Basis For The Relief Requested Therein.

20 12. CIBC's Motion cites Rule 41(b) of the Federal Rules of Civil Procedure as grounds  
21 for dismissing the Claims Objection.<sup>3</sup> It also cites two cases which are inapplicable here but only  
22 demonstrate the egregious circumstances required to warrant dismissal for lack of prosecution. In *In*  
23 *re Walker*, 332 B.R. 820 (Bankr. D. Nev. 2005), a Nevada bankruptcy court denied a motion to

24 <sup>1</sup> See EX PARTE APPLICATION FOR ORDER AUTHORIZING AND APPROVING EMPLOYMENT OF LITIGATION  
COUNSEL FOR DEBTORS (LAW OFFICE OF WILLIAM L. CONTI) [Dkt. No. 283] filed on June 18, 2013.

25 <sup>2</sup> The Debtors' motion to extend the stay will show, among other things, that CIBC is receiving and will  
26 continue to receive adequate protection payments at the full contract rate, that the Debtors' occupancy rate has risen to  
over 94%, that the Debtors' expenses have been reduced (specifically with respect to leasing commissions and tenant  
improvements expenses), and that the Debtors' operations have considerably improved over the last two quarters.

27 <sup>3</sup> Such Rule, subtitled "Involuntary Dismissal; Effect" provides: "If the plaintiff fails to prosecute or to comply  
with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal  
order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule . . . operates as an  
28 adjudication on the merits."

1 reconsider the dismissal of a relief from stay motion wherein moving counsel was accused of  
2 harassment but failed to reply to the opposition and to appear at the hearing, and provided no support  
3 for any justifiable excuse for his absence. In *In re Virginia Store Fixtures, Inc.*, 61 B.R. 250 (Bankr.  
4 E.D. Va. 1986), the court issued a Memorandum Order to “prevent control of the Court’s docket by  
5 the parties.” There, in the underlying matter, the trustee filed a complaint to recover property and  
6 served notice of the trial, and at the trial, requested that the court then treat the trial as an Initial Pre-  
7 Trial Conference so the trustee could conduct discovery. Because the trustee had no evidence to  
8 present, the court dismissed his case. In its Memorandum Order, the bankruptcy court noted that the  
9 trustee’s failure to comply with Bankruptcy Rule 7026 and the need to retain control and prevent  
10 “careless handling” of its docket. *Id.* at 252.

11       13. Of course, none of the circumstances or behavior described above is present here.  
12 The Debtors have not failed to appear at any hearing during the bankruptcy cases, much less any  
13 hearing on the Claims Objection, nor have they shown any indifference to proceeding with their  
14 Claims Objection. Nor have the Debtors attempted to sidestep applicable procedural rules or to  
15 manipulate the Court’s docket. Indeed, there is no risk that the Court has not retained, or will not  
16 retain, control of its docket in these bankruptcy cases.

17       14. CIBC’s Motion concludes, without any basis, that because the Debtors have not yet  
18 set the Claims Objection for hearing, they “did not intend to proceed with prosecution of the Claims  
19 Objections when they filed them.” CIBC’s BRIEF IN SUPPORT OF ITS MOTION TO DISMISS THE  
20 DEBTORS’ CLAIM OBJECTIONS FOR WANT OF PROSECUTION (the “CIBC Brief”) p. 5, lines 19-20.  
21 This statement is plainly without basis. The Claims Objection was filed prior to the Confirmation  
22 Hearing because, as the Court recognized, the amount of CIBC’s Claim was germane to the issue of  
23 confirmation. There is no basis or reason to conclude that because the Debtors have not noticed a  
24 hearing on the Claims Objection, they do not intend to prosecute them.

25       15. The reasons why the Debtors have not set the Claims Objection for hearing are  
26 obvious. First, the Debtors have been focused on preparing an Amended Plan of Reorganization and  
27 gathering the required evidence from their current operations that establish the viability of the  
28

1 [proposed] Amended plan. In short, they are seeking to reorganize for the benefit of the bankruptcy  
2 estates. Second, the Debtor has placed considerable effort into locating alternate financing to satisfy  
3 CIBC's claim, as well as to "lean out" their operating expenses to make the business as attractive as  
4 possible to potential buyers. Third, there is no need to litigate the Claims Objection issues until a  
5 refinancing or sale is in place for approval by the Court, or a reorganization plan is presented to the  
6 Court for confirmation. Fourth, not only would litigating the Claims Objection require expenditure  
7 of the Debtors' resources, it would also require the Debtors' professionals and CIBC's professionals  
8 to incur expenses. As CIBC has made abundantly clear, it has already incurred fees which "could be  
9 quite substantial" which it contends are accruing with its claim. CIBC Brief p. 4, line 14, n. 2.

10 Focusing on and undertaking litigation of the Claims Objection at this time would be an unnecessary  
11 and potentially wasteful use of the estates' resources. It seems that all parties would be better served  
12 by coordinating a hearing on the Claims Objection with a subsequent confirmation hearing to the  
13 extent the Court ultimately allows such a hearing.

14 **B. Applicable Standards**

15 16. The Motion fails to provide any applicable standard to dismiss the Claims Objection.  
16 Nonetheless, the standard which courts have applied all militate against granting the Motion. As set  
17 delineated in *Blake v. Trutwein (In re Trutwein)*, 2007 Bankr. LEXIS 4252 (B.A.P. 9th Cir. Nov. 19,  
18 2007):

19 20 The Ninth Circuit requires that the trial court weigh five factors to  
determine whether to dismiss a case for lack of prosecution:

- 21 (1) the public's interest in expeditious resolution of litigation;  
22 (2) the court's need to manage its docket;  
23 (3) the risk of prejudice to the defendants;  
24 (4) the public policy favoring the disposition of cases on their  
merits; and  
25 (5) the availability of less drastic sanctions.

26 *Id.* at \*13-14 (citations omitted).

27 17. Dismissal of a case is improper when less drastic alternatives are not considered and  
28

1 when there is no evidence of prejudice to the defendant. *Raiford v. Pounds*, 640 F.2d 944, 945 (9th  
2 Cir. 1981); *cf. Henderson v. Duncan*, 779 F.2d 1421 (9th Cir. 1986) (dismissal was properly within  
3 court's discretion only after plaintiff received at least three initial warnings of dismissal and after a  
4 status conference to address the issue).

5       18. Here, as set forth above, there is no threat to the Court's management and control of  
6 its docket. In addition, the Debtors have compelling reasons for not noticing and litigating the  
7 Claims Objection at this time. They are focused on reorganizing for the benefit of the estates and all  
8 creditors, and litigating the Claims Objection immediately would be unnecessary and potentially a  
9 wasteful misuse of the estates' resources. In addition, the Motion does not provide any suggestion  
10 for less drastic sanctions. For example, if it were so compelled to have the exact amount of its claim  
11 finally determined, CIBC could have filed a motion requesting the Court to set the Claims Objection  
12 for hearing. It did not.

13           **C. Risk Of Prejudice Falls Solely On The Debtors.**

14       19. CIBC cannot demonstrate any prejudice it has suffered or will suffer because the  
15 Claims Objection has not already been finally determined. "In determining whether a defendant has  
16 been prejudiced, an appellate court is to consider whether plaintiff's actions impair the defendant's  
17 ability to go to trial or threaten the rightful decision of the case." *Tenorio v. Osinga (In re Osinga)*,  
18 91 B.R. 893, 895 (9th Cir. B.A.P. 1988). CIBC's ability to litigate the Claims Objection or to obtain  
19 a "rightful" determination on the allowability of its claim has not been compromised and is under no  
20 threat.

21       20. CIBC only contends that it is prejudiced because its claim will not be determined by  
22 the September 1, 2013 date established in the Conditional Stay Order. As set forth above, the  
23 Debtors will be filing a motion to extend the automatic stay and the September 1, 2013 deadline. In  
24 addition, there is no risk to CIBC for any alleged delay caused by the Debtors. The Debtors have  
25 made adequate protection payments to CIBC since August 2012 which amounts were increased in  
26 March 2013, and, moreover, the Subject Property continues to appreciate in value. Thus, CIBC is  
27 adequately protected by a growing equity cushion.

1       21. On the contrary, granting the Motion would not only severely prejudice the Debtors,  
2 it will lead to a patently unjust result. The Motion characterizes the Claims Objection as a matter  
3 which requires relitigation of CIBC's claim. Indeed, the Motion indicates that CIBC is entitled to  
4 attorneys' fees, default interest and late charges, in addition to principal. While the Debtors concede  
5 that the Court's determination of the claim in the Order Denying Confirmation was limited to the  
6 determination of plan confirmation, the Court nonetheless spent judicial time in reaching its decision  
7 to disallow default interest after *full briefing, evidentiary presentation and extended argument by the*  
8 *parties*. Specifically, the Court found that "the default interest provision is punitive in character and  
9 lacks any proportional relationship to the actual damages which may flow from any of the Events of  
10 Default." Order Denying Confirmation, p. 16, lines 6-8. Therefore, it is unlikely that CIBC can  
11 provide any new facts or new law which can persuade the Court that its well-reasoned decision  
12 should be different from what has already been determined – that default interest is not allowable.

13       22. CIBC's Motion further acknowledges that since December 2012, "[b]ecause of the  
14 payment of full interest payments under the Stay Relief Order (identified infra) beginning with  
15 March of 2013, the only way the claim has grown is through CIBC's incurring additional attorneys'  
16 fees from December 2012 to date and the continued accrual of default interest." CIBC Brief, p. 2,  
17 lines 22–25.

18       23. As such, determination of the amount of CIBC's claim ultimately should  
19 predominantly be based on a calculation including contract interest, with litigation reduced mainly to  
20 the allowance of attorneys' fees.<sup>4</sup> As the Court is aware, allowance of attorneys' fees to a secured  
21 creditor is subject to the bankruptcy court's determination that the secured creditor is entitled to the  
22 fees under applicable law and, if so, that the fees are reasonable and necessary to the protection of  
23 the creditor's claim. *Countrywide Home Loans, Inc. v. Hoopai (In re Hoopai)*, 581 F.3d 1090 (9th  
24 Cir. 2009); *In re Hungerford*, 19 Mont. B.R. 103, 136-138 (Bankr. Mont. 2001) (reviewing cases).  
25 Moreover, it is the secured creditor's burden to establish that its fee request is reasonable. *In re*  
26 *Parreira*, 464 B.R. 410, 415 (Bankr. E.D. Cal. 2012).

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28       <sup>4</sup> In that regard, in the instance that the determination of CIBC's allowed claim is necessary at some point, such a determination likely will not require extensive litigation or cause extensive delay.

24. Notwithstanding the foregoing, the Motion portends what will result if CIBC is granted its request: “The only transaction that can close on the current record is one that pays CIBC the \$44.14 million it believed it was owed as of February 1, 2013, plus whatever fees it has incurred from December 2012 to date and additional interest.” CIBC Brief p. 4, lines 12-14 (footnote omitted). What CIBC’s Motion truly seeks to do is - (a) obtain a reversal of the determination that default interest on the claim is impermissible, and (b) relieve CIBC of its burden to prove allowance of its attorneys’ fees - *both without any litigation on the merits*. Not only is such a result prejudicial to the Debtors and their estates, it is patently unjust and should not be countenanced.

25. It is therefore evident why CIBC has filed the Motion at this time. As stated above, CIBC could have simply moved the Court to set the Claims Objection for hearing. Instead it has effectively requested that the Court allow its claim in full, including all fees, default and non-default interest and all charges, without fulfilling any of its burdens to support and substantiate all such fees and penalties. Accordingly, the Motion is inappropriate and should be denied in full.

**WHEREFORE**, the Debtors respectfully request that this Court enter its Order:

1. Denying the Motion; and
  2. For such other relief as the Court deems proper and just.

Dated: July 10, 2013

DORSEY & WHITNEY LLP

By: /s/ Robert A. Franklin  
Robert A. Franklin  
Attorneys for Debtors